FILED
MAY 12 1992
OFFICE OF THE CLERK

No. 91-1441

In the Supreme Court of the United States

OCTOBER TERM, 1991

SHWC, INC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J.T. BYRNE
General Counsel

JACK D. SMITH
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
Senior Counsel

J. SCOTT WATSON
Senior Attorney
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

1. Whether the Federal Deposit Insurance Corporation properly succeeded the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for a failed thrift institution following FSLIC's abolition.

2. Whether the court of appeals correctly determined that petitioners' affirmative defenses and counterclaims were barred under state law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bishop v. *Wood*, 426 U.S. 341 (1976)	8
Bowen v. *Massachusetts*, 487 U.S. 879 (1988)	8
Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985)	8
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	6
Coastal Plains Dev. Corp. v. *Micrea Inc.*, 572 S.W.2d 285 (Tex. 1978)	5, 9
D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942)	4
FDIC v. *Bank of America Nat'l Trust & Savings Ass'n*, 701 F.2d 831 (9th Cir.), cert. denied, 464 U.S. 935 (1983)	9-10
Minute Maid Corp. v. *United Foods, Inc.*, 291 F.2d 577 (5th Cir.), cert. denied, 368 U.S. 928 (1961)	9
United States v. *Hohri*, 482 U.S. 64 (1987)	8
Virginia v. *American Booksellers Ass'n*, 484 U.S. 383 (1988)	8

Statutes:

Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*:	
12 U.S.C. 1819	10
12 U.S.C. 1821	7
12 U.S.C. 1821a	7
12 U.S.C. 1821a(a)	8
12 U.S.C. 1823(e) (1988 & Supp. II 1990)	

Statutes—Continued: Page

Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 161(b), 105 Stat. 2285-2286 (12 U.S.C. 1821a) 7, 8
Federal Home Loan Bank Act, ch. 522, § 17, 47 Stat. 736 (12 U.S.C. 1437 (1988)) 3
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, Tit. IV, 103 Stat. 354:
§ 401, 103 Stat. 354 ..... 3, 5
§ 401(i)(1), 103 Stat. 357 6
National Housing Act, ch. 847, § 402, 48 Stat. 1256 (12 U.S.C. 1725 (1988)) 3

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1441

SHWC, INC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16a-33a) is reported at 945 F.2d 853. The opinion of the district court (Pet. App. 1a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1991. A petition for rehearing was denied on December 6, 1991. Pet. App. 34a-35a. The petition for a writ of certiorari was filed on March 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 18, 1984, petitioner SHWC, Inc. (SHWC) executed two notes payable to Vernon Savings and Loan Association (Old Vernon) for principal amounts of $10 million and $1.25 million. Each note was secured by a separate deed of trust on certain Dallas property, which SHWC was to develop with the borrowed funds. The notes were guaranteed by petitioners Swanson, Heister, and Wilson, and by L.L. Claycomb. Pet. App. 17a-19a.

As part of the loan transaction, SHWC granted to Old Vernon a 50% profits interest in the secured property. The "profits assignment" provided:

> *No Member or Partner.* By its acceptance of this Profits Assignment, Assignee [Old Vernon] does not become a member or a partner of or with Assignor [SHWC]. Consequently, in no event shall Assignee be liable for any of the debts, obligations or liabilities of Assignor or of its partners as a result of the execution of this Profits Assignment and in no event shall Assignee be liable for any contributions to Assignor. Assignee's only interest in Assignor shall be Assignee's right to receive interests granted to Assignee and assigned under this Profit Agreement.

Pet. App. 18a-19a. The loan agreement also contained a provision stating, in pertinent part:

> *No Liability of Lender.* Lender shall have no liability, obligation, or responsibility whatsoever with respect to the construction of Improvements except to advance the Loan and the Borrower's Deposit pursuant to this Loan Agreement.

Id. at 19a. Under the terms of both notes, principal and accrued interest were due and payable on April 18, 1986. *Id.* at 20a.

SHWC defaulted on the notes. On December 7, 1986, Old Vernon filed suit on the notes in Texas state court against SHWC and the guarantors. During the pendency of the state court proceedings, Old Vernon was declared insolvent by the Federal Home Loan Bank Board (Bank Board),[1] and the Federal Savings and Loan Insurance Corporation (FSLIC)[2] was appointed receiver. As receiver, FSLIC transferred Old Vernon's assets to Vernon Savings and Loan Association, FSA (Vernon FSA). Subsequently, the Bank Board declared Vernon FSA insolvent, and appointed FSLIC as receiver for Vernon FSA. On December 16, 1987, FSLIC was formally substituted for Vernon FSA in the state court proceedings and removed the case to federal court. Following the enactment of FIRREA and the abolition of FSLIC, the Federal Deposit Insurance Corporation (FDIC) was substituted as party plaintiff. Pet. App. 20a.

---

[1] The Bank Board was a federal agency created pursuant to the Federal Home Loan Bank Act, ch. 522, § 17, 47 Stat. 736, formerly codified at 12 U.S.C. 1437 (1988) (repealed 1989). The Bank Board was charged with chartering and supervising savings and loan associations and directing the operations of the Federal Savings and Loan Insurance Corporation. The Bank Board was abolished by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 401, 103 Stat. 354.

[2] The Federal Savings and Loan Insurance Corporation was a federal instrumentality created pursuant to the National Housing Act, ch. 847, § 402, 48 Stat. 1256, formerly codified at 12 U.S.C. 1725 (1988) (repealed 1989), to insure deposit accounts in savings and loan associations. The FSLIC, like the Bank Board, was abolished by FIRREA.

2. The FDIC filed a motion for summary judgment to recover on the notes and guarantees. SHWC raised affirmative defenses and counterclaims alleging failure of consideration, usury, fraud, and breach of contract. The defenses were based on SHWC's theory that a partnership existed between Old Vernon and SHWC. On June 29, 1989, the district court denied FDIC's motion because it was unable to determine the legal relationship between the parties based on the "profits assignment." Pet. App. 21a & n.6.

On January 30, 1990, the FDIC filed a second motion for summary judgment, asserting that SHWC's defenses were barred under Texas law, the protections afforded the FDIC under *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and the federal holder-in-due-course doctrine. Pet. App. 21a. The district court granted that motion, holding that, under Texas law, no partnership between SHWC and Old Vernon existed. The district court concluded that "[t]he unmistakable intent of the parties * * * was to create a relationship whereby Old Vernon would provide loans to SHWC and SHWC would agree to repay those loans with interest. * * * The loan documents at issue do not refer to or evidence in any way the existence of a partnership." *Id.* at 5a. The district court held that, under Texas law, an expressed intention of the parties not to create a partnership, coupled with the absence of a provision for the sharing of losses, precluded a finding that the parties were partners. *Id.* at 5a-6a.[3]

The district court also rejected SHWC's usury claim, holding that the loan documents contained a

---

[3] Because of its state law holding, the district court did not consider whether the *D'Oench, Duhme* or federal holder-in-due-course doctrines barred SHWC's partnership claims.

usury savings clause that, under state law, defeated a usury claim. Because the notes specified a lawful interest rate, and the usury savings clause demonstrated a clear intent to avoid any illegal interest charges, the court concluded that the loans were not usurious. Pet. App. 10a.

3. The court of appeals affirmed. First, the court rejected SHWC's claim that the FDIC did not have authority to act as successor to FSLIC as receiver for the failed thrift. The court noted that Section 401 of FIRREA, Pub. L. No. 101-73, Tit. IV, 103 Stat. 354, which abolished FSLIC (see note 2, *supra*), provided that the resolutions creating FSLIC receiverships were to remain in effect, and that FDIC was authorized by the statute to enforce orders pertaining to pre-FIRREA receiverships. Pet. App. 25a. The court also held that Congress clearly intended to grant FDIC authority to succeed the FSLIC with respect to receiverships established prior to January 1, 1989. Finally, the court noted that FIRREA provides that no lawsuits involving the FSLIC are to abate as a result of FSLIC's abolition; FIRREA mandates that "the appropriate successor to the interests of the [FSLIC] shall be substituted." *Ibid.*

Turning to the merits, the court held that SHWC's partnership and usury claims were barred by Texas state law. Citing *Coastal Plains Dev. Corp.* v. *Micrea, Inc.*, 572 S.W.2d 285, 288 (Tex. 1978), the court of appeals held that the "profits assignment" provision disavowing the existence of a partnership, coupled with the express provision disavowing the sharing of losses and liability, precluded a finding of partnership as a matter of law. Pet. App. 27a. The court of appeals also held that the "usury savings clauses" in the loan documents, which reflected the parties' intention to

abide by the usury laws, defeated SHWC's usury claims. *Id.* at 29a.[4]

ARGUMENT

1. Petitioners contend (Pet. 10-16) that in enacting FIRREA, Congress failed to provide authority for the FDIC to succeed to receiverships to which the FSLIC had been appointed prior to January 1, 1989. That contention is incorrect and, in any event, is of no continuing importance.

As the court of appeals explained, FIRREA specifically provides that "the resolutions creating the receivership[s] for which the FSLIC was receiver remain in effect" following the abolition of the FSLIC. Pet. App. 24a. In Section 401(i)(1) of FIRREA, Pub. L. No. 101-73, Tit. IV, 103 Stat. 357. Congress provided that following the enactment of FIRREA, the Director of the Office of Thrift Supervision and the Director of the FDIC shall "identify the regulations and orders which relate to the conduct of conservatorships and receiverships in accordance with the allocation of authority between them under this Act." In view of this provision, and others indicating that FIRREA did not intend to create a "gap" in the continuation of receiverships, the court of appeals was correct in stating that FIRREA's transitional provisions "clearly express the intent on the part of Congress to grant FDIC authority to succeed to the FSLIC with respect to

---

[4] The court of appeals also relied on *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), in finding that SHWC's usury claim should be rejected because it was punitive in nature, would have no deterrent effect as applied to the FDIC, and "would only serve to punish innocent creditors of the failed institution by diminishing available assets." Pet. App. 31a.

receiverships appointed prior to January 1, 1989." Pet. App. 25a.

In any event, petitioner's contention that FIRREA did not authorize the FDIC to succeed to former FSLIC receiverships for which FSLIC was appointed prior to August 9, 1989, is of no future significance. In Section 161(b) of the Federal Deposit Insurance Corporation Improvement Act of 1991, Congress amended the Federal Deposit Insurance Act, 12 U.S.C. 1821a (Supp. II 1990), to state:

> [e]ffective August 10, 1989, the Corporation shall succeed the Federal Savings and Loan Insurance Corporation as conservator or receiver with respect to any depository institution —
>
> > (i) the accounts of which were insured before August 10, 1989 by the Federal Savings and Loan Insurance Corporation; and
> >
> > (ii) for which a conservator or receiver was appointed before January 1, 1989.

Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2286 (to be codified at 12 U.S.C. 1821a).[5] In light of Congress's

---

[5] The provision states, in full:

> (b) CLARIFICATION OF FDIC POWERS IN FSLIC RESOLUTION FUND CONSERVATORSHIPS AND RECEIVERSHIPS. — * * *
>
> * * * * *
>
> "(5) CORPORATION AS CONSERVATOR OR RECEIVER. —
>
> "(A) IN GENERAL. — Effective August 10, 1989, the Corporation shall succeed the Federal Savings and Loan Insurance Corporation as conservator or receiver with respect to any depository institution—

enactment of that provision, there can be no further dispute that the FDIC is empowered to act as successor to FSLIC receiverships such as this one.

2. Petitioners contend (Pet. 16-19) that the court of appeals erred in its application of Texas state law to the particular loan documents under which it was held liable to the FDIC in this case. The court's analysis of state law does not present an issue warranting review by this Court,[6] and petitioners' claims are also mistaken.

a. Petitioners argue (Pet. 17) that the court applied a different standard for determining whether a partnership existed when one of the partners is a savings and loan association. The court of appeals, however, applied well-settled Texas state law

---

> "(i) the accounts of which were insured before August 10, 1989 by the Federal Savings and Loan Insurance Corporation; and
>
> "(ii) for which a conservator or receiver was appointed before January 1, 1989.
>
> "(B) RIGHTS, POWERS, AND DUTIES. — When acting as conservator or receiver with respect to any depository institution described in subparagraph (A), the Corporation shall have all rights, powers, and duties that the Corporation otherwise has as conservator or receiver under this Act.".

Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 161(b), 105 Stat. 2285-2286, amending 12 U.S.C. 1821a(a) (Supp. II 1990).

[6] See *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988); *United States* v. *Hohri*, 482 U.S. 64 (1987); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Bishop* v. *Wood*, 426 U.S. 341, 346 & n.10 (1976).

establishing the necessary elements of a partnership agreement. As the court of appeals noted, the Texas Supreme Court set forth the controlling law in *Coastal Plains Dev. Corp.* v. *Micrea, Inc.*, 572 S.W.2d 285, 288 (Tex. 1978), where the court held that an expressed intent of the parties not to create a joint venture, coupled with the absence of an agreement to share losses, precluded a finding of joint venture. Pet. App. 27a. In this case, several provisions disclaim the existence of a partnership, and another provision disclaims liability of Old Vernon except to lend money to SHWC. The court of appeals properly found that these provisions clearly demonstrate the intent of the parties not to become partners.[7]

b. Petitioners also err in challenging (Pet. 17-18) the court of appeals' determination that SHWC's usury claim was barred. The court's holding rests on the application of Texas state law to the particular usury savings clause at issue in the loan documents. It reflects the fact that the parties expressed a clear intent to avoid a usurious transaction. Rather than "retrospectively changing" petitioners' contract rights (Pet. 17), the court of appeals simply held the parties to the manifest terms of the agreement.

c. Finally, petitioners err in claiming a conflict between the court of appeals' decision and *FDIC* v. *Bank of America Nat'l Trust & Savings Ass'n*, 701

---

[7] Petitioners' claim that the court of appeals deviated from its earlier decision in *Minute Maid Corp.* v. *United Foods, Inc.*, 291 F.2d 577 (5th Cir.), cert. denied, 368 U.S. 928 (1961), in barring SHWC's partnership claims raises, at most, an intra-circuit conflict over Texas law, which would not require review here. In any event, in *Minute Maid*, unlike in this case, there were no express provisions disclaiming an agreement to share in losses or liability or disavowing the existence of a partnership.

F.2d 831 (9th Cir.), cert. denied, 464 U.S. 935 (1983). Petitioners apparently contend (Pet. 19) that because the court of appeals suggested that their usury claim would be invalid under federal as well as state law,[8] the decision conflicts with *Bank of America Nat'l Trust & Savings Ass'n*, which petitioners interpret as holding that state law alone determines the liability of FDIC as receiver. The proposition that state law alone determines the liability of FDIC as receiver is incorrect, see, *e.g.*, 12 U.S.C. 1823(e) (1988 & Supp. II 1990), but, in any event, petitioner misstates the holding of *Bank of America Nat'l Trust & Savings Ass'n*. The Ninth Circuit held only that when FDIC proceeds in its *corporate* capacity, federal law applies. 701 F.2d at 834.[9] There is, therefore, no conflict between the two cases.

---

[8] Applying the rationale of *City of Newport*, the court of appeals stated that the FDIC receivership, which was created to serve the public interest, should not be subject to a punitive usury statute when it would only serve to punish innocent creditors of the receivership and, ultimately, innocent taxpayers. Pet. App. 31a.

[9] The Ninth Circuit noted in passing that the provision in the Federal Deposit Insurance Act that cases involving the FDIC shall be deemed to arise under the law of the United States for purposes of removal has an exception for cases in which the FDIC is acting "as receiver of a State bank," *Bank of America Nat'l Trust & Savings Ass'n*, 701 F.2d at 834, citing 12 U.S.C. 1819. That provision is irrelevant in this case because the FDIC's removal power is not at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ALFRED J.T. BYRNE
General Counsel

JACK D. SMITH
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
Senior Counsel

J. SCOTT WATSON
Senior Attorney
Federal Deposit Insurance Corporation

MARCH 1992